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Response to Stakeholder Requests

Northwest Basins Planning Area
Stakeholders Meeting

February 28, 2017

Stakeholder's Requests

ADWR has received requests for information from stakeholders regarding 1) ways in which groundwater regulation is developed and 2) the components of Active Management Areas.

This presentation is designed to respond to those requests.

Ways in which Regulation can be Developed

New groundwater regulation can come about in a few ways. Each way has its own benefits, drawbacks, and obstacles.

Three ways in which groundwater regulation can come about:

1. New legislative enactment (statutes)
2. Designation of INA or AMA following statutorily-prescribed procedures
3. County, municipal, or other local regulation

New Legislative Enactment

Pros:

- Can be creative/flexible in devising solutions
- Relative certainty that regulations will be enforceable
- Usually comes about through consensus-building and compromise

Cons:

- May require large degree of consensus across use sectors
- May require state-wide support

Example: Groundwater Management Act

The Groundwater Management Act of 1980 came about from a collaborative effort of water users across various use sectors. Enactment required intense negotiation and extensive compromise.

History of the Groundwater Management Act

- Beginning in the 1940's Arizona began to lobby Congress to construct a canal (Central Arizona Project "CAP" canal) to transport Arizona's Colorado River water allotment into the state.
- Beginning in the late 1940's, the federal government pressured Arizona to enact effective groundwater legislation as a condition for financing construction of the CAP.
- Between 1950's and 1970's Arizona Supreme Court issued decisions limiting transportation of groundwater by mines and City of Tucson.
- 1977 – Legislature passed amendments to 1948 Groundwater Code, primarily to allow transportation of groundwater away from the overlying land under certain circumstances. No new restrictions on groundwater use.

History of the Groundwater Management Act

- However, 1977 law created a 25-member Study Commission to develop a recommended comprehensive groundwater management act and submit the recommendations to the Legislature by December 31, 1979.
- The Study Commission's recommendations would become law if the Legislature failed to enact groundwater legislation by September 7, 1981.
- The Department of Interior threatened that it would discontinue funding for the delivery of CAP water prior to adoption of the Act.

“Sometimes things have to get so bad that it’s almost impossible to do anything more before people really come together” -Former Arizona Governor Bruce Babbitt

The Levels of Groundwater Management

The Act established three “levels” of regulation:

1. Statewide (not highly regulated). Requires that all wells be registered with ADWR and that new wells be constructed in compliance with certain construction standards. Established rules regarding the transportation of groundwater.
2. Created Irrigation Non-Expansion Areas (INAs). Prohibits the irrigation of land which was not irrigated during the 5 years preceding the creation of the INA. Imposes metering and reporting requirements for withdrawals from non-exempt wells.
3. Created Active Management Areas (AMAs) (most highly-regulated areas)

Designation of AMAs/INAs via statutorily-prescribed procedure

By statute, ADWR can only designate an INA or AMA after hearing and if it makes very specific findings.

For instance, in order to designate an INA, the Director must determine that there is insufficient groundwater to provide a reasonably safe supply for irrigation of the cultivated lands in the area at current rates of withdrawal. The Director recently declined to designate an INA in the San Simon sub-basin because this test was not satisfied.

A decision to designate an AMA or an INA made by the Director is subject to judicial review. This can lead to uncertainty for water users after the Director issues a decision.

Designation of an AMA by Vote

A groundwater basin which is not already within an AMA may be designated as an AMA, upon petition signed by 10% of the registered voters residing within the boundaries of the proposed active management area and a subsequent election held pursuant to general election laws of the state. A.R.S. § 45-415.

Designation of an AMA by Vote

Area:

- Must consist of a groundwater basin and may not be smaller than a groundwater basin or include more than one groundwater basin

Petition:

- Petition must be signed by at least 10% of registered voters residing within the boundaries of the groundwater basin and submitted to the Board of Supervisors of that county

Election:

- If a petition with the required number of signatures is submitted to the Board of Supervisors, an election must be called

Designation of an AMA by Vote

Irrigation of new acres is prohibited pending an election:

- If the Board of Supervisors calls an election to designate a subsequent AMA, an irrigation user may irrigate within the proposed AMA only acres of land that were legally irrigated at any time during the five years preceding the date of the call of the election.
- This temporary restriction continues in effect until the final results of the election are certified by the Board of Supervisors.

Local Water Management Regulation

Whether a county or municipality has the authority to implement water management regulations involves at least two major questions:

1. Does the county/municipality have the express or implied authority to do what it proposes to do under the Arizona Constitution and/or Arizona statutes?
2. Is the regulation preempted by some other state law?

Express/Implied Authority

1. Does the county/municipality have the express or implied authority to do what it proposes to do under the Arizona Constitution and/or Arizona statutes?

- Political subdivisions of the state, like counties and municipalities, possess only those powers delegated to them in the state's Constitution or by statute.
- The primary statutes concerning the authority of counties are contained in Title 11 of the Arizona Revised Statutes.
- The primary statutes concerning the authority of municipalities are contained in Title 9 of the Arizona Revised Statutes.

Express/Implied Authority

In 1972, the Yavapai County BOS denied approval of a subdivision plat based on a county ordinance that required the proof of the availability of domestic water. The County's authority to regulate subdivisions is set forth in statute (then § 11-806.01). In *Owens v. Glenarm Land Company, Inc.*, 24 Ariz. App. 430 (App. 1975), the Arizona Court of Appeals ordered the BOS to approve the plat, finding that the County had no authority under the statute to inquire into the availability of water before granting plat approval.

Preemption

2. Is the regulation preempted by some other state law?

Whether a state law preempts local regulation depends on:

- A. whether the subject matter of the regulation is of statewide concern and
- B. whether the regulation conflicts with state statute or the Legislature has occupied the field by enacting a statute pertaining to the same subject matter.

If the answer to both A. and B. is “yes,” the local regulation will be found to be preempted.

Preemption

A. Is the subject matter of the regulation of statewide concern?

Examples of purely local concerns:

- Regulation of smoking in restaurants
- Prohibiting firearms in city parks

Examples of statewide concerns:

- Uniformity in the circulation of municipal referendum petitions
- Restrictions on sign walkers

Preemption

B. Has the Legislature occupied the field by enacting a statute pertaining to the same subject matter?

“The existence of a preempting policy must be clear.”

A state statute will be found to completely occupy the field in a particular area only where the “assertedly competing provisions in question must be actually conflicting, rather than capable of peaceful coexistence.”

“Mere commonality of some aspect of subject matter is insufficient.”

Preemption

In *City of Prescott v. Town of Chino Valley*, 163 Ariz. 608 (App. 1989), the Arizona Court of Appeals upheld a transaction privilege tax imposed by the Town of Chino Valley on the operation of a water pipeline owned by and transporting water to the City of Prescott. The court found no preemption saying, “As comprehensive as the Groundwater Management Act is, we find nothing in it that preempts an otherwise appropriate, nondiscriminatory local privilege tax. In our opinion a tax like the present one was not out of the realm of the foreseeable, and if the legislature had been of a mind to preclude any such tax, we believe it would have done so in appropriate terms.”

Preemption

Coconino County denied a motel a conditional use permit to transport water by truck from various locations within Coconino County. The County relied upon its planning and zoning authority and denied the permit on the ground that the additional truck traffic “would be detrimental to the public health, safety or welfare or materially injurious to the property of others.”

In an unpublished memorandum decision, *Squire Motor Inns, Inc. v. Coconino County*, 2 CA-CV 90-0131 (1990), the Court of Appeals agreed with a lower court’s finding that there was no competent evidence to support the County’s decision, but also noted that the County’s findings “may mask reliance on what all parties agree is an impermissible factor, that the use is for water transfer. What the state permits may not be forbidden by local zoning law.”

Active Management Areas



Management Goal

There are five AMAs: Prescott, Phoenix, Pinal, Tucson, and Santa Cruz. Each AMA has a management goal.

- Management goal of the Phoenix, Prescott, Tucson and Santa Cruz AMAs – safe-yield by 2025. Safe-yield is a long-term balance between the amount of groundwater being withdrawn in the AMA and the amount of natural and artificial recharge in the AMA.
- Management goal of Pinal AMA: To allow development of non-irrigation uses as allowed by the Act and to preserve existing agricultural economies for as long as feasible, consistent with the necessity to preserve future water supplies for non-irrigation uses.

Prohibition on Irrigation of New Acres

- Only lands irrigated during previous five years may be irrigated
- Two Exceptions
- Irrigation with previously established surface water rights
- Lands not actually irrigated are deemed to be irrigated if “substantial capital investment” was made “for the subjugation of such land for an irrigation use including on-site irrigation distribution facilities and a well or wells, the drilling and construction of which were substantially commence before the date of the notice of the initiation of designation procedures or the call for the election.”

Groundwater Withdrawals in AMAs

- In an AMA, a person may withdraw groundwater only as follows:
 - The groundwater is withdrawn from an exempt well (pump capacity ≤ 35 gpm and groundwater used for non-agricultural purpose).
 - The groundwater is withdrawn pursuant to a groundwater withdrawal authority.
 - Grandfathered groundwater right
 - Groundwater withdrawal permit
 - Service area right

Exempt Wells

- Only one exempt well may be used to serve the same use at the same location.
- Withdrawals from an exempt well for a commercial purpose are limited to 10 acre-feet per year.
- An exempt well may not be drilled on land within 100 feet of the distribution system of a water provider with a designation of assured water supply without the water provider's consent (with certain exceptions).

Non-Exempt Wells

- In an AMA, a person may withdraw groundwater from a non-exempt well only pursuant to one of the following withdrawal authorities:
 - A grandfathered groundwater right.
 - A groundwater withdrawal permit.
 - A service area right.
- A person withdrawing groundwater from a non-exempt well must:
 - Meter the withdrawals and report the amount withdrawn each year to ADWR.
 - Pay a groundwater withdrawal fee of up to \$5.00 per acre-foot to ADWR.

Grandfathered Groundwater Rights

- Grandfathered Groundwater Rights are groundwater withdrawal rights based on historic pumping.
- There are three types of grandfathered groundwater rights:
 - Irrigation grandfathered rights.
 - Type 1 non-irrigation grandfathered rights. Issued for non-irrigation uses on retired IGFR land.
 - Type 2 non-irrigation grandfathered rights. Issued for non-irrigation uses anywhere within the AMA.

Groundwater Withdrawal Permits

- A person may apply to the Department for a groundwater withdrawal permit.
- Groundwater withdrawal permits allow the permit holder to withdraw groundwater for a non-irrigation use for a prescribed period of time if certain conditions are met.
- Types of Withdrawal Permits
 - Hydrologic testing permits (10 af or less/up to 1 year)
 - Poor quality groundwater permits
 - Temporary electrical energy generation permits for emergency situations
 - Mineral extraction permits
 - Drainage and dewatering permits
 - General industrial use permits

Service Area Rights

- A service area right is a right of a city, town, private water company or irrigation district to withdraw groundwater for delivery to customers within its service area.
- The right expands as the service area expands.

Management Plans

- ADWR is required to prepare and adopt management plans for AMAs designed to assist the AMA in meeting its management goal.
- Management plans contain mandatory conservation requirements for persons withdrawing, distributing and using groundwater.

Well Drilling – Exempt Wells

- Before drilling, deepening or replacing an exempt well in an AMA, a person must file a Notice of Intent (NOI) to drill with ADWR and obtain a drilling card.
- The well must be drilled by a licensed well driller and the well must be constructed in compliance with ADWR's well construction standards.

Well Drilling – Non-Exempt Wells

- Before drilling a new non-exempt well in an AMA, a person must obtain a well permit from ADWR.
- A person must have a grandfathered groundwater right, a groundwater withdrawal permit or a service area right in order to obtain a well permit.

Assured Water Supply Program

Within AMAs, a developer of a proposed subdivision must have a 100-year assured water supply (AWS) in order to obtain plat approval and offer lots for sale.

Well Impact/Spacing Rules

- An application for a permit to drill a new non-exempt well in an AMA must be denied if the proposed well would cause unreasonably increasing damage to surrounding land and other water users.
- ADWR has adopted rules defining what is unreasonably increasing damage.
- A proposed non-exempt well that will replace an existing non-exempt well is exempt from the well impact/spacing rules in certain circumstances.

Additional Regulation in an AMA

- **Metering Requirements** (*non-exempt wells*)
- **Annual Reporting Requirements** (*non-exempt wells*)
- **Restrictions on Filling and Refilling Bodies of Water**
- **Groundwater Transportation Laws**

Questions?

